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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1219

S. BUCHSBAUM & CO., A CORPORATION; ASKANIA REGULATOR CO., A CORPORATION; DIAMOND BRAIDING MILLS, INC., A CORPORATION; DIAMOND WIRE & CABLE CO., A CORPORATION; JAMES G. HEGGIE MFG. CO., A CORPORATION; HOLLUP CORPORATION, A CORPORATION; INDEPENDENT PNEUMATIC TOOL CO., A CORPORATION; J. P. SEEBURG CORP., A CORPORATION; WESTERN FELT WORKS, A CORPORATION; E. M. WEYMER CO., A CORPORATION; A. M. STEELHAMMER, LILLIAN C. STEELHAMMER, ADAM GABRIEL AND ANNA F. GABRIEL, COPARTNERS DOING BUSINESS AS ACME INDUSTRIAL CO.; AGAR PACKING & PROVISION CORP., A CORPORATION AND THE VICTOR MANUFACTURING AND GASKET COMPANY, A CORPORATION,

Appellants,

vs.

ROBERT L. GORDON, DIRECTOR OF LABOR OF THE STATE OF ILLINOIS,

Appellee

APPEAL FROM SUPREME COURT OF ILLINOIS, ITS NO. 28416

JURISDICTIONAL STATEMENT

The basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to

review the order of affirmance in the above entitled cause, entered by the Supreme Court of Illinois on January 17, 1945 (which became final on March 20, 1945, on the entry of an order by that Court denying the petition for rehearing and modifying the opinion theretofore filed in certain respects) is that such decision was rendered by the highest court of the State of Illinois in which a decision in the suit could be had and there was drawn in question the validity of a statute of the State of Illinois on the ground of its being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States and the decision was in favor of its validity.

(a) The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 237(a) of the Judicial Code, as amended. (U. S. C. A. Title 28, Sec. 344(a).)

(b) The statute of Illinois, the validity of which is involved, consists of the third and fourth paragraphs of Section 18(c)(5)(B) of the Illinois Unemployment Compensation Act, which were incorporated into that Act by amendment approved June 30, effective July 1, 1943. Said amendatory act is identified as Senate Bill 398 found in Laws of Illinois, 1943 (63rd General Assembly) Vol. 1, pp. 666-676, the specific paragraphs of Section 18(c)(5)(B) involved being found at pp. 671-672. The statutory provisions in question also appear in Illinois Revised Statutes (1943) (State Bar Association Edition) Chap. 48, Sec. 234(c)(5)(B) pars. 3 and 4, p. 1641, col. 2). The entire Section 18 as amended by the law identified as Senate Bill 398 appears at pp. 23-37, Section 18(c)(5)(B) at pp. 29-31, and the third and fourth paragraphs thereof appear at p. 30 of the Appendix hereto. For convenience throughout these proceedings and herein said Section 18(c)(5)(B) has been referred to as the "war risk amendments."

(c) The judgment of affirmance sought to be reviewed was rendered January 17, 1945, petition for rehearing denied and opinion modified March 20, 1945. This application for appeal is being presented on April 9, 1945. That is in ample time. *Market St. Ry. Co.* v. *R. R. Comm.* (No. 510 & 511, this Term), 13 L. W. 4272 (decision March 26, 1945), Sec. 8(a) Act of Feb. 13, 1925 (U. S. C. A. Title 28, Sec. 350(a)). The opinion rendered January 17, 1945 appears at pp. 39-58, and the modifications made in the opinion upon denial of the rehearing appear at pp. 58-60 of the Appendix hereto.

The Nature of the Case and the Rulings of the Court Which Bring the Case Within the Jurisdictional Provision Relied Upon.

This is a consolidated cause in which were consolidated 14 cases in the Circuit Court of Cook County, Illinois. One is a proceeding filed in that court by way of writ of certiorari pursuant to Section 25(a)(2) of the Illinois Unemployment Compensation Act, seeking review of the action of the Director of Labor, appellee herein, in denying a claim filed under Section 25(d) of said Act for credit or refund of the payment of its contribution for the first quarter of 1944 by appellant, S. Buchsbaum & Company and praying the allowance of such claim. The other cases are 13 mandamus proceedings filed in said Court by all appellants, including S. Buchsbaum & Company, praying the issuance of a writ of mandamus to the Director of Labor, appellee, requiring him to expunge from his records, kept pursuant to said Act, relative to the relator in each suit, his purported contribution rate determination for the calendar year 1944 applicable to said relator. All such proceedings raise identical substantive issues regarding the power and jurisdiction of the Director of Labor under said Act and the constitutional validity of the aforesaid statutory provisions.

In the proceedings under review appellants based their rights upon the invalidity of the contribution rate determinations made with respect to them for the calendar year 1944 by the Director of Labor by applying to them the "war risk amendments." They asserted that the "war risk amendments" were void and no part of the law of Illinois, (1) because denying them equal protection of the laws in violation of Section 1 of the 14th Amendment to the Federal Constitution, (2) because violative of various provisions of the Illinois Constitution and (3) because they had been repealed. Appellants contended that, the rate determinations having been made by the Director pursuant to the dictate of these void statutory provisions, they operated to deprive appellants of their property without due process of law in violation of Section 1 of the 14th Amendment to the Federal Constitution and a similar Illinois constitutional provision and amounted to wholly arbitrary action by the Director in excess of his jurisdiction and powers under the Act. Both the Circuit Court of Cook County, Illinois and the Illinois Supreme Court overruled all of appellants' contentions in this regard, holding the "war risk amendments" constitutional under both the Federal and Illinois Constitutions and a valid unrepealed portion of Section 18 of the Act.

Specifications of the Stages in the Proceedings at Which and the Manner in Which the Federal Questions Sought to Be Reviewed Were Raised.

The proceedings reviewed in the certiorari case were begun by the filing of a claim for credit or refund with the Director of Labor, appellee. The claim itself asserted that the application of the "war risk amendments" to claimant in determining its contribution rate for the calendar year 1944 and the contribution rates so determined were unconstitutional and void because denying to claimant due process

of law and equal protection of the laws in violation of the 14th Amendment. (Abst. 66, 68.) After an ex parte denial of the claim (Abst. 69), claimant filed its Protest and Petition for Hearing (Abst. 54), in which it asserted the invalidity of the "war risk amendments" because denying to claimant the equal protection of the laws in violation of the 14th Amendment (Par. XII; Abst. 62) and that the action of the Director in purporting to determine claimant's contribution rate for 1944 pursuant to the "war risk amendments" and the rates so determined deprived claimant of its property without due process of law in violation of Section 1 of the 14th Amendment. (Abst. 55.) Because without judicial power (*Topliss & Harding, Inc.* v. *Murphy,* 384 Ill. 463 at 467-468 (1943)) the Director did not pass on this issue (Abst. 69. 81-82).

In the trial court the issues in the certiorari proceeding were raised, in accordance with Illinois practice (*Topliss & Harding, Inc.* v. *Murphy,* 384 Ill. 463, at 467-468 (1943)) by the filing by claimant of a motion to quash the record of the Director and for allowance of its claim (Abst. 84). Ground 2 of the motion expressly set forth the contention that the "war risk amendments" denied claimant equal protection of the laws, and ground 7 the contention that the action of the Director in determining claimant's contribution rate for 1944 pursuant to the "war risk amendments" and the rate determination so made deprived claimant of its property without due process of law, all in violation of Section 1 of the 14th Amendment (Abst. 85, 86). The final order of the Circuit Court in the certiorari proceeding denied said motion and expressly overruled said grounds 2 and 7 thereof (Abst. 151).

In the mandamus cases the issues were raised in the trial court by motions of appellee to strike the petitions and dismiss the suits (Abst. 106-108). The mandamus petitions of 9 appellants, for all of whom the Director purported to

determine the war risk rate of 2.7% under the third paragraph of Section 18(c)(5)(B) are substantially identical and abstracted only once (Abst. 87-106). Similarly, the mandamus petitions of four appellants, for all of whom the Director purported to determine a 2% war risk rate, are substantially identical and abstracted only once (Abst. 110-130). In both groups of petitions the first cause of action dealt with the contention of repeal, and the second cause of action with the contention of the unconstitutionality of the "war risk amendments", the second cause of action adopting by reference various paragraphs of the first cause of action (Abst. 98, 121).

Paragraph II of the second cause of action alleged the repugnancy to the 14th Amendment of the "war risk amendments" in denying to relators equal protection of the laws, (Abst. 99, 121) and paragraph X. of the first cause of action, adopted by reference into the second cause of action, alleged that the action of the Director in purporting to determine the contribution rates of relators pursuant to the "war risk amendments" and the contribution rates so determined deprived relators of their property without due process of law in violation of the 14th Amendment (Abst. 95, 118). The final order of the trial court sustained appellee's motion to strike the mandamus petitions and dismiss the mandamus proceedings (Abst. 154), the Court expressly finding that the "war risk amendments" did not deny to relators equal protection of the laws and that the action of the Director in determining the contribution rates of relators pursuant to the "war risk amendments" and the rates so determined did not deprive relators of their property without due process of law, in violation of the 14th Amendment (Abst. 152-154).

Under Illinois practice assignments of error are abolished and in lieu thereof appellants are required to set forth in their opening briefs the errors relied upon. In their open-

ing brief in the Supreme Court of Illinois appellants asserted that, both in the certiorari proceeding and in the mandamus proceedings, the Circuit Court erred in failing and refusing to hold "(2)" that the "war risk amendments" denied appellants equal protection of the laws in violation of Section 1 of the 14th Amendment and "(5)" that the action of the Director in purporting to apply the "war risk amendments" in determining the contribution rates for the calendar year 1944 of appellants, and the purported contribution rate determinations so made, operated to deprive appellants of their property without due process of law in violation of Section 1 of the 14th Amendment. (Brief and Argument for Appellants, pp. 28, 29.)

These alleged errors were fully argued in appellants' briefs. (Brief and Argument for Appellants, pp. 33-34, 35-36, 82-115, 115-122. Reply Brief and Argument for Appellants, pp. 51-69, 71.)

In its opinion the Supreme Court of Illinois expressly overruled the contention of appellants that the "war risk amendments" denied to them the equal protection of the laws. (Appendix hereto, p. 53.) It did not reach the issue of "due process of law", since the contention of lack of due process in making the rate determinations pursuant to the "war risk amendments" is based upon the assumption that the "war risk amendments" are invalid and the Supreme Court of Illinois upheld their validity against all grounds of attack.

The issue of unconstitutionality under the 14th Amendment of the "war risk amendments" was also raised in appellants' petition for rehearing (pp. 9-12).

Statement of Grounds Upon Which It Is Contended That the Questions Involved Are Substantial

Illinois enacted its Unemployment Compensation Act in 1937. It adopted the pooled-fund plan whereby all contribu-

tions from all employers are pooled in a single, undivided fund from which benefits are paid to eligible employees, without regard to the identity of their former employers.

To accomplish its purpose a fund is created to be held by the State Treasurer as custodian and to be administered by the Director of Labor. The primary source of the fund are annual contributions paid by employers subject to the Act.

The times of payment and rates of contribution by employers are provided for in Section 18 of the Act. They accrue annually and are payable quarterly. The rate is a percentage of the wages payable by each employer with respect to employment during the year in question. Originally and through the calendar year 1942 there was an arbitrary statutory rate of 2.7% applicable to all employers subject to the Act.

Section 18 was amended in 1941 to provide, beginning with the calendar year 1943, for variable rates based upon the benefit experience of individual employers as compared to the benefit experience of all employers subject to the Act. This change recognized the importance to the accomplishment of the purposes and objectives of the Act of rewarding in this manner employers who achieve in their own businesses the desired stabilization of employment. It provided an incentive to that end.

The variable rates range between 0.5% and 3.6%. Each year the Director is required to determine each employer's rate pursuant to Section 18 and to notify him of it. To qualify for a variable rate an employer must have incurred liability for the payment of contributions within each of the five calendar years immediately preceding the year for which the rate was being determined. It is undisputed that all of the appellants qualified for variable rates for the calendar year 1944, ranging between 0.5% and 1.5%.

Payrolls in Illinois expanded very substantially as a result of the war, creating the possibility that the demands upon the fund for the payment of benefits due to sudden and greatly increased unemployment at the war's end would render the fund insolvent. To protect against this eventuality the General Assembly enacted during June, 1943, the law known as Senate Bill 398. It dealt with this problem by adding to Section 18 the paragraphs appearing under Section 18(c)(5)(B). They provide war risk rates of 2% and 2.7%. They are applicable to the two and one-half year period from July 1, 1943 through December 31, 1945. Only the third and fourth paragraphs relate to the calendar year 1944. Consequently they are the only paragraphs, the validity of which is involved herein.

The "war risk amendments" apply solely to employers, who are not only subject to the Act, but who also are entitled under Section 18 (exclusive of the "war risk amendments") to variable rates of contribution applicable to their entire payrolls for the calendar year in question and which are lower than the war risk rates.

The applicability of the war risk rates to any employer is determined by comparing his payroll for the preceding calendar year with his 1940 payroll and by comparing his variable rate for the year for which his contribution rate is being determined to the applicable war risk rate.

If his 1943 payroll showed an increase of 150% or more as compared with his 1940 payroll and his variable rate for 1944 was less than 2.7%, his variable rate was applied to the first $100,000 of his 1944 payroll, but he was required to pay contribution on his entire 1944 payroll in excess of $100,000 at the arbitrary war risk rate of 2.7%. This is provided in the third paragraph of Section 18(c)(5)(B).

If his 1943 wages showed an increase of more than 100% but less than 150% as compared with his 1940 wages and

his variable rate for 1944 was less than 2%, his variable rate was applied to the first $100,000 of his 1944 payroll, but he was required to pay contribution on his entire 1944 payroll in excess of $100,000 at the arbitrary war risk rate of 2%. This is provided in the fourth paragraph of Section 18(c)(5)(B).

If his 1943 payroll showed an increase of less than 100% over his 1940 payroll, the war risk rates do not apply to his 1944 payroll, without regard to its size either absolutely or relatively to his 1940 payroll. This is the result of these two paragraphs.

All appellants except Diamond Braiding Mills, Inc., James G. Heggie Mfg. Co., Independent Pneumatic Tool Co., and The Victor Manufacturing and Gasket Company, came within the third paragraph of the "war risk amendments." Applying it to them the Director of Labor in each instance determined a variable rate ranging between 0.5% and 1.5%, applicable to the first $100,000 of payroll for 1944 and a 2.7% war risk rate applicable to the entire balance of their 1944 payrolls. The four above named appellants came within the purview of the fourth paragraph. The Director of Labor determined for each of them pursuant thereto a variable rate of 0.5% applicable to the first $100,000 of their 1944 payrolls and the 2% war risk rate applicable to the entire excess of their 1944 payrolls over $100,000.

The 1944 payrolls of all appellants substantially exceeded $100,000, ranging between $200,000 and $5,000,000. Appellants contended below and now contend that the "war risk amendments" deny them equal protection of the laws in violation of Section 1 of the 14th Amendment in the following ways:

1. As between employers given war risk rates and all of whose 1944 payrolls exceed $100,000, by burdening them with war risk rates with respect to their 1944 payrolls without regard to the relationship of the sum of $100,000 to their

payrolls either for 1940, 1943 or 1944. For example, Employer A with a 1940 payroll of $50,000 has a 1943 and 1944 payroll of $500,000 while Employer B with a 1940 payroll of $500,000 has a 1943 and 1944 payroll of $1,500,000. The payroll expansion of Employer A as compared to 1940 is 10 to 1 both for 1943 and 1944, while the payroll expansion of Employer B for both years is only 3 to 1. Both are given the 2.7% war risk rate. Nevertheless, because the first $100,000 of the 1944 payroll is exempt from the war risk rate, employer A pays no contribution at a war risk rate on that portion of his 1944 payroll which is double his 1940 payroll, while Employer B pays contribution at his war risk rate on 80% ($400,000) of that portion of his 1944 payroll which is no greater than his 1940 payroll ($500,000). Also, by reason of such arbitrary exemption, Employer A pays contributions at the war risk rate on only 80% ($400,000) of his 1944 payroll ($500,000), even though it is 10 times his 1940 payroll ($50,000), while Employer B pays contributions at the war risk rate on 93% ($1,400,000) of his 1944 payroll ($1,500,000), although it is only 3 times as large as his 1940 payroll ($500,000). These discriminations result entirely from the arbitrary statutory exemption of the first $100,000 of the 1944 payrolls of employers given war risk rates from their burden. They are typical instances of the unequal application of these statutory provisions as between employers subject thereto.

Such inequalities are not only without logical relationship to the objects and purposes of the war risk amendments, but in fact directly contrary thereto. Employers with the greater payroll expansion over 1940 are treated more favorably than other employers having smaller expansion over 1940.

2. The arbitrary exemption from the burden of the war risk rates of the first $100,000 of 1944 payroll of employers, all of whom were given war risk rates because of the extent

of their payroll expansions between 1940 and 1943 has created arbitrary and unconstitutional inequalities and discriminations in favor of those employers whose 1944 payrolls do not exceed $100,000 and against those employers whose 1944 payrolls exceed $100,000, including appellants.

3. The failure to graduate the burden of the war risk rates with respect to the 1944 payrolls of employers subject thereto by (a) exempting from the application of any war risk rate that portion of the 1944 payroll of all employers subject thereto which does not exceed its 1940 payroll by 100% or more, (b) subjecting only to a 2% war risk rate that portion of the 1944 payrolls of employers given a 2.7% war risk rate which exceeds their 1940 payrolls by 100% but less than 150%, and (c) subjecting to the 2.7% war risk rate only those portions of the 1944 payrolls of employers given such rate which exceed their 1940 payrolls by 150% or more.

According to the opinion of the Illinois Supreme Court (Appendix, p. 53), these contentions of denial of equal protection of the laws are "completely answered" by a statement in the opinion of the Supreme Court of the United States in *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, which sustained the Unemployment Compensation Act of the State of Alabama as follows (pp. 510-511):

> "Distinctions in degree, stated in terms of differences in number, have often been the target of attack, see *Booth* v. *Indiana*, 237 U. S. 391, 397. It is argued here, and it was ruled by the court below, that there can be no reason for a distinction for purposes of taxation, between those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency

> is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not."

This statement in the opinion of the United States Supreme Court was made in answer to the contention that the Alabama law was unconstitutional in denying equal protection of the laws because it applied only to employers of at least eight employees. In the very next paragraph of its opinion (301 U. S. at p. 511) that Court pointed out that administrative convenience and expense in the collection of the tax are "alone" a "sufficient" justification for the difference between the treatment of small taxpayers and that meted out to others, adding:

> "We cannot say that the expense and inconvenience of collecting the tax from small employers would not be disproportionate to the revenue obtained."

The contentions herein may not be answered in any such manner. There can be no problem of determining whether the expense and inconvenience of collection would be disproportionate to the revenue obtained. All the employers whose exemption from the burden of the war risk rates (given them because of their payroll expansion) furnishes the basis for the attack herein were, nevertheless, subject to the Act and required to pay contributions at lower variable rates on their entire 1944 payrolls even though not burdened with the war risk rates. In reality, if they had to contribute at their war risk rates, more revenue at the same cost of collection would necessarily be received from them. They would pay contributions on the same payrolls at substantially higher rates.

Equal protection of the laws is a standard, as distinguished from a rule of law. It must be applied to an infinite

variety of facts and circumstances. The Illinois Supreme Court pointed out in *City of Chicago* v. *Ames*, 365 Ill. 529 (1937) that for this reason precedents are of limited value. The question is always the reasonableness of the classifications attacked in the particular case. It said (p. 535):

> "Numerous cases have been cited by the appellants where the classification has been sustained as based on a reasonable difference between the things differently classified. The decisions of the courts sustaining or rejecting such classifications are, however, of little assistance unless they be analogous on the facts. The principle involved in all the cases is uniformly announced as the constitutional requirement of reasonableness of the classification."

We submit that there is no substantial similarity between the question of equal protection of the laws raised herein and the question raised in *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, by the provision excluding from the application of the Alabama law employers of fewer than eight employees or any other provision of that law.

That case may also be distinguished upon the further ground that the Alabama law is a revenue measure, the validity of which was to be determined in the light of "constitutional principles applicable to State taxation" (301 U. S. at p. 509), while the Illinois Supreme Court holds that the Illinois law is an exercise of the police power. *Zehender & Foster, Inc.* v. *Murphy*, 386 Ill. 358 at 362 (1944). *Zelney* v. *Murphy*, 387 Ill. 492 at 496-497, 499 (1944).

We recognize that equal protection of the laws is a concept of somewhat vague meaning; that it does not require that laws be either mathematically accurate, scientifically correct or entirely logical; and that the power of State Legislatures to classify the subjects of legislation is very broad and entitled to a large presumption of the existence

of facts and circumstances sufficient to justify the discriminations and inequalities created.

Nevertheless, there is a limit to legislative power. The duty to preserve that limit is imposed by the equal protection clause of the 14th Amendment upon the courts. In *Hill* v. *Texas*, 316 U. S. 400 (1942) Chief Justice Stone said (p. 406):

> "Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand."

In *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942) Mr. Justice Douglas said (p. 541):

> "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' * * * (p. 542) The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines (as the legislature drew in that case) could be drawn."

In order to meet the requirements of this constitutional provision the classifications, inequalities and discriminations created by legislation must bear some recognizable, reasonable and logical relationship to the objects and purposes of the law.

The purposes of the Illinois Unemployment Compensation Law are clearly expressed in the "declaration of policy" set forth in Section 1 as a guide to its interpretation and application (Appendix p. 38). They are to lessen the serious menace to the welfare of our people from economic insecurity due to involuntary unemployment and to encourage stabilization of employment. The purpose of the "war risk amendments" and the evils sought to be remedied thereby are stated in the Illinois Supreme Court opinion herein as follows (Appendix pp. 41-42):

"These war expanded employers under the experience rating plan are being assigned reduced rates of contributions which reduced rates of contribution were earned on the basis of the three prior years of experience which included both non-war and war production and represented much smaller pay rolls. The result is that these war expanded employers during this period would pay contributions at these reduced rates on increased pay rolls and *would thus not bear a fair share of the potential post-war burden.* Clearly, when these employers contribute at reduced rates they cannot contribute *an amount sufficient to take care of the potential liability created by their workers employed in these war expanded industries,* who are acquiring benefit rights which are many times greater than the contributions which are being or will be paid on their wages. Moreover, even if these employers are assigned higher rates under the experience rating plan in the post-war period, such higher rates on reduced pay rolls will not result in a sufficient yield of contributions to meet the benefits paid to the workers laid off by these employers." (Emphasis ours.)

The opinion further elucidates the legislative intent in enacting "war risk amendments" in the following (Appendix, p. 54):

"Under the amendments, the determining factor as to whether an employer shall pay his experience variable rate on his entire pay roll or whether that rate shall be applied only to the wages paid which are not in excess over $100,000, and a higher rate on the excess over $100,000, is based upon a comparison of the wages paid during the next preceding calendar year with the wages paid during the calendar year 1940. *It is obvious that the calendar year 1940 was selected as the basic year for comparison with the wages paid in future years because it was assumed that the calendar year 1940 was a normal year, uninfluenced by wartime conditions.*" (Emphasis ours.)

(Appendix, p. 57):

> "Obviously, the greater the wartime expansion of the pay rolls, the greater the potential liability for the payment of unemployment compensation during the post-war period when there will be the greatest drain on the unemployment compensation fund. *There is, therefore, a direct relation between war-expanded pay rolls and the potential liability which will be incurred as a result of war-time increase in employment.*" (Emphasis ours.)

This analysis of the law and its purposes by the Illinois Supreme Court makes it apparent that the arbitrary exemption of the first $100,000 of the 1944 payrolls of employers given war risk rates, because of the disproportionately large expansion of their payrolls between 1940 and 1943, renders unconstitutional these statutory provisions. The record is not only entirely barren of any support for an inference that this arbitrary limitation of $100,000 has any reasonable or logical relationship whatever to the purposes either of the original Act or of the "war risk amendments," but actually supports the contrary inference.

The example at pp. 10-11, *supra*, of the wholly arbitrary discriminatory treatment of hypothetical Employer A and hypothetical Employer B, whereby Employer A with a payroll expansion of 10 to 1 enjoys more favorable treatment than Employer B with a payroll expansion of only 3 to 1 (such inequalities being the inevitable result of the $100,000 provision) demonstrates that the law operates exactly contrary to its purposes and objectives. According to the Illinois Supreme Court, the greater the wartime expansion of payrolls the greater the potential liability for the payment of unemployment compensation during the post-war period and there is a direct relation between war expanded payrolls and the potential liability which will be

incurred as a result of wartime increase in employment. Consequently, an employer with a payroll expansion of 1000% would suffer severer (not more favorable) treatment than an employer with a payroll expansion of only 150%, if the classifications created by the law bore any logical relationship to its objects and purposes.

A multiplication of examples should not be necessary to demonstrate the wholly arbitrary character of the $100,000 yardstick and the unconstitutional inequalities and discriminations resulting from its operations. According to the Supreme Court, 1940 was selected as the year for comparison upon the assumption that that was a normal year uninfluenced by wartime conditions. The Commissioner of Placement and Unemployment Compensation of the Illinois Department of Labor presented to the Illinois Senate Committee on Industrial Affairs, to which the bill embodying the "war risk amendments" had been referred, a "comparative payroll analysis of selected expanded employers." It makes crystal clear the absence of any relationship between $100,000 and 1940 payrolls of Illinois employers (Add. Abst., p. 19). That analysis, containing 1940 and 1942 payrolls of 32 Illinois employers, shows payrolls expanding from $109.00 in 1940 to in excess of $391,000 in 1942 and from in excess of $390,000 in 1940 to in excess of $17,000,000 in 1942, with many variations in between. All demonstrate the absence of any relationship whatever between $100,000 and either 1940 payrolls or the expansion thereof in subsequent years.

No inequality or discrimination dealt with by the United States Supreme Court in *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495 bears even a remote analogy to the unconstitutional discriminations and inequalities produced by this provision of the "war risk amendments."

We regard it significant that both Oklahoma and Iowa gave full recognition to the principle for which we contend

at this point in enacting their "war risk amendments." They took no arbitrary dollar figure (such as $100,000) as the dividing line in the current year's payroll between the portion to which the employer's variable rate based on benefit experience was applicable and the portion to which his war risk rate was to be applied. They used the "normal year's" payroll for this purpose and thereby avoided the denial of equal protection of the laws which renders the Illinois "war risk amendments" unconstitutional.

The Iowa law subjects to the war risk rate only "the excess of payroll of the employer over his payroll for 1940" and gives him the benefit of his variable rate based upon benefit experience with respect to that portion of his payroll "equal to his payroll for 1940." (Section 1551.13(c), Ch. 77.2 of Iowa Code of 1939, as amended.)

The Oklahoma law imposes a war risk rate of 2.7% "for any portion of his annual taxable payroll in excess of 300% of whichever is the lesser of his actual taxable payrolls for the three calendar years immediately preceding the current year" and gives the employer subject to this war risk rate the benefit of his variable rate on that portion of his payroll for the current year below such amount. (Title 40, Ch. 6, Sections 217(c), Okla. Statutes 1941, as amended by H. B. 205, Laws 1943 approved and effective March 26, 1943 and by H. B. 323, Laws 1943, approved and effective April 12, 1943.)

The Order from Which the Appeal Is Prayed Does Not Rest on an Independent State Ground

Section 18(c)(7)(C) (Appendix, p. 35) provides:

> "The Director shall promptly notify each employer of his rate of contributions for each calendar year as determined *pursuant to this Section,* by mailing notice thereof to his last known address. *Such rate determination* shall be final and conclusive upon the employer

for all purposes and in all proceedings whatsoever, unless within 15 days after mailing of notice thereof, the employer files with the Director an application for review of *such rate determination*, setting forth his reasons in support thereof." (Emphasis ours.)

None of the appellants filed applications for review with the Director of Labor under said statutory provision. The rate determinations complained of by appellants were made pursuant to the "war risk amendments." Appellants have always contended that the "war risk amendments" were no part of the Act or Section 18 thereof, because of their repeal and unconstitutionality and, therefore, that rate determinations made pursuant to them were void. They relied upon the decisions of the Illinois Supreme Court in *Department of Finance* v. *Gold*, 369 Ill. 427, and the line of cases of which a recent one is *Owens Illinois Glass Co.* v. *McKibben*, 385 Ill. 245 (1944), in support of the well established principle of Illinois law that a person attacking administrative action as void is not required to exhaust administrative remedies as a condition precedent to judicial relief. They also pointed out that the statutory provision itself made "final and conclusive" only rate determinations made "pursuant" to Section 18 and that, if the "war risk amendments" were invalid either because repealed or unconstitutional, rate determinations pursuant to them were obviously not pursuant to that section; and, consequently, they did not come within the scope of its language making "such" rate determinations "final and conclusive upon the employer."

In the concluding paragraphs of its opinion rendered January 17, 1945, beginning with the fifth paragraph from the end of the opinion (Appendix, pp. 57-58), the Illinois Supreme Court appeared to hold, in spite of the fact that it had decided the issues of repeal and unconstitutionality on the merits, that the failure of appellants to pursue the ad-

ministrative remedy deprived them of the right to question in these proceedings the validity of the rate determinations upon the ground of the invalidity of the "war risk amendments" pursuant to which they were admittedly made.

In their petition for rehearing appellants pointed out the ambiguity created by the opinion in this respect and the possible handicap to appellants in seeking review in the United States Supreme Court which might result therefrom. Appellants requested that, even though a rehearing were denied, this portion of the opinion be modified by adding clarifying language to show that the decision of the Federal question was necessary to the decision rendered. Appellants set forth in their petition for rehearing at p. 8 the verbatim modification which they desired made in the opinion theretofore rendered to clarify this holding. The modification which the Supreme Court of Illinois made in its opinion at the same time that it denied the petition for rehearing was by adopting verbatim the additions to the sixth and third paragraphs from the end of the opinion requested by appellants to accomplish this clarification. Appendix (pp. 58-60) contains these paragraphs at the end of the opinion, showing in italics the additions, which were the only modifications made. They will be found upon comparison to be identical with those requested at p. 8 of the petition for rehearing.

By such clarification the Supreme Court of Illinois made manifest its intention to rest its order of affirmance upon a holding, of which its decision that the "war risk amendments" are not repugnant to the "equal protection clause" of the 14th Amendment is an integral and necessary basis.

In *Herb* v. *Pitcairn*, 89 L. Ed. (Adv. Ops.) 481, decided February 5, 1945 (Case No. 24 at the 1944 Term), the United States Supreme Court sent back to the Supreme Court of the State of Illinois the proceeding there involved, in order

to have the Illinois Supreme Court clarify its opinion in order to show "whether it has intended to rest the judgment herein on an adequate and independent State ground or whether decision of the Federal question was necessary to the judgment rendered." By its action in modifying its opinion in compliance with the request of appellants in their petition for rehearing, the Illinois Supreme Court in this case has already demonstrated its intention to make decision of the Federal question necessary to the judgment rendered.

Cases Believed to Sustain Jurisdiction

Liggett Co. v. *Lee*, 288 U. S. 517 (1933);
Stewart Drygoods Co. v. *Lewis*, 294 U. S. 550 (1935);
A. & S. F. R. R. Co. v. *Vosburg*, 238 U. S. 56 (1915);
Southern Ry. Co. v. *Va.*, 290 U. S. 190 (1933);
Nashville, C. & St. L. R. R. Co. v. *Walters*, 294 U. S. 405 (1935);
Hartford Steam Boiler Inspection & Ins. Co. v. *Harrison*, 301 U. S. 459 (1937);
Wichita R. R. & Light Co. v. *Public Utilities Comm.*, 260 U. S. 48 (1922);
Herb v. *Pitcairn*, 89 L. Ed. (Adv. Ops.) 481 (1945).

Conclusion

We respectfully submit that the United States Supreme Court has jurisdiction of this appeal and that substantial Federal questions are presented.

Respectfully submitted,

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APPENDIX "A"

Section 18. Payment of Contributions.) (a) (1) On and after July 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Act, with respect to wages payable for employment occurring during the six months' period beginning July 1, 1937, and the calendar years 1938, 1939 and 1940. For the year 1941 and for each calendar year thereafter, contributions shall accrue and become payable by each employer, at the rate hereinafter prescribed, upon the wages paid with respect to employment after December 31, 1940. Such contributions shall become due and shall be paid quarterly on or before the last day of the month next following the calendar quarter for which such contributions have accrued; except that any employer who is delinquent in filing a contribution report or in paying his contributions for any calendar quarter may, at the discretion of the Director, be required to report and to pay contributions on a calendar month basis. Such contributions shall not be deducted in whole or in part, from the wages of individuals in such employers' employ. If the Director shall find that the collection of any contributions will be jeopardized by delay he may declare the same to be immediately due and payable.

(2) In the payment of any contributions, interest or penalties, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

(3) Interest. Any employer who shall fail to pay any contributions when required of him by the provisions of this Act and the Rules and Regulations of the Director, whether or not the amount thereof has been determined and assessed by the Director, shall pay to the Director, in addition to such contribution, interest thereon at the rate of one per cent (1%) per month and one-thirtieth (1/30) of one per cent (1%) for each day or fraction thereof computed from the day upon which said contribution became due.

(4) Penalties. Any employer who shall fail to file a report of wages paid to each of his workers for any period in

the manner and within the time required by the provisions of this Act and the Rules and Regulations of the Director, or if the Director shall pursuant to such regulations extend the time for filing such report shall fail to file such report within such extended time, shall, in addition to any sum otherwise payable by him under the provisions of this Act, pay to the Director as a penalty a sum equal to 2 per cent of the contributions payable by such employer for such period, for each month or part thereof of such failure to file such report, provided that such penalties shall not exceed 10 per cent of the amount of such contributions.

If the Director shall deem any report of wages paid to each of the workers of any employer insufficient, he shall notify such employer to file a sufficient report. If such employer shall fail to file such sufficient report within 30 days after the mailing of such notice to him, he shall, in addition to any sum otherwise payable by him under the provisions of this Act, pay to the Director as a penalty a sum equal to 2 per cent of the contributions for such period, unpaid by him at the time of the mailing of such notice, for each month or part thereof of such failure to file such sufficient report, provided that such penalties shall not exceed 10 per cent of the amount of such contribution.

If any employer shall willfully fail to pay any contribution or part thereof when required by the provisions of this Act and the Rules and Regulations of the Director, with intent to defraud the Director, then such employer shall in addition to such contribution or part thereof pay to the Director a penalty equal to 50 per cent of the amount of such contribution or part thereof, as the case may be.

(b) Rate of Contribution. Each employer shall pay contributions equal to the following percentages of wages paid or payable (as hereinafter set forth) with respect to employment:

(1) Three and six-tenths per centum with respect to wages payable for employment for the six months' period beginning July 1, 1937: Provided, that if the total of such contributions at such three and six-tenths per centum rate equals less than one and eight-tenths per centum of the

total wages payable by any employer with respect to employment during the calendar year 1937, such employers shall pay, not later than January 31, 1938, an additional lump sum contribution with respect to employment for such six months' period beginning July 1, 1937, equal to the difference between one and eight-tenths per centum of such total wages for the calendar year 1937 and the total of his contributions at such three and six-tenths per centum rate for such six months' period beginning July 1, 1937, and provided further that in no event shall the contribution required from any employer with respect to employment during the six months' period beginning July 1, 1937, exceed one and eight-tenths per centum of the wages payable by him with respect to employment during the calendar year 1937.

(2) Two and seven-tenths per centum with respect to wages payable for employment during the calendar years 1938, 1939, and 1940.

(3) Two and seven-tenths per centum with respect to wages paid during the calendar year 1941 and each calendar year thereafter, with respect to employment after December 31, 1940, except as may be otherwise provided in subsection (c) of this Section.

(c) Future Rates Based on Benefit Experience. Nothing in this Act shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him either on his own behalf or on behalf of such individuals.

For the calendar year 1943 the contribution rate of each employer who has incurred liability for the payment of contributions under this Act within each of the calendar years 1938, 1939, 1940 and 1941; and for the calendar year 1944 and each calendar year thereafter, the contribution rate of each employer who has incurred liability for the payment of contributions under this Act within each of the five calendar years immediately preceding the calendar year for which a rate is being determined, shall be determined as hereinafter provided. The contribution rate of all other employers shall be 2.7%.

(1) (A) Prior to July 1, 1941, when a worker is paid benefits for the second compensable week of unemployment, with respect to any benefit year his wages during his base period shall immediately become benefit wages.

(B) On and after July 1, 1941 (and except as is otherwise provided in this section), when a worker is paid benefits which, when added to benefits previously paid for the same benefit year, equal or exceed three times his weekly benefit amount for that benefit year, his wages during his base period shall immediately become benefit wages.

(C) If any benefit wages are increased by reason of the reconsideration by a deputy of his finding, the amount of such increase shall be treated as if it became benefit wages on the day on which such deputy made such reconsidered finding.

(2) An employer's benefit wages shall be the wages earned from or paid by him, as the case may be, which became benefit wages. For purposes of this subsection an employer's benefit wages with respect to any one worker shall include only the first $1,024 of wages in any base period prior to the base period 1941; and with respect to the base period 1941 and each base period thereafter, an employer's benefit wages with respect to any one worker shall include only the first $1,375 of wages in such base period.

(3) (A) In the determination of contribution rates for the calendar year 1943, the benefit wage ratio of each employer shall be a percentage equal to the total of his benefit wages for the three most recently completed calendar years, divided by his total wages for insured work for the same three years on which contributions were paid to the Director on or before January 31, 1943.

(B) In the determination of contribution rates for the calendar year 1944 and for each calendar year thereafter the benefit wage ratio of each employer shall be a percentage equal to the total of his benefit wages for the 36 consecutive calendar month period ending June 30 of the calendar year immediately preceding the calendar year for which a rate is being determined divided by his total wages

for insured work for the same period on which contributions were paid to the Director on or before July 31 immediately following such June 30.

(4) (A) In the determination of contribution rates for the calendar year 1943 the total benefits paid from this State's account in the unemployment trust fund during the three most recently completed calendar years shall be termed the loss experience. The loss experience less all repayments to this State's account in the unemployment trust fund during the three most recently completed calendar years divided by the total benefit wages of all employers for the same three completed calendar years, after adjustment of any fraction to the next higher multiple of one per cent, shall be termed the state experience factor.

(B) In the determination of contribution rates for the calendar year 1944 and for each calendar year thereafter the total benefits paid from this State's account in the unemployment trust fund during the 36 consecutive calendar month period ending June 30 of the calendar year immediately preceding the calendar year for which a rate is being determined shall be termed the loss experience. The loss experience less all repayments to this State's account in the unemployment trust fund during the same 36 consecutive calendar month period divided by the total benefit wages of all employers for the same period, after adjustment of any fraction to the next higher multiple of one per cent, shall be termed the state experience factor.

(C) The state experience factor shall be determined for each calendar year by the Director. In the determination of the state experience factor for the calendar year 1943 any change in the benefit wages of any employer after December 31, 1942, shall not affect the state experience factor as determined by the Director. In the determination of the state experience factor for the calendar year 1944 and for each calendar year thereafter any change in the benefit wages of any employer after June 30 of the calendar year immediately preceding the calendar year for which the state experience factor is being determined shall not affect the state experience factor as determined by the Director.

(5) (A) The contribution rate for each employer shall be the percentage at the head of the lowest numbered column in the following table, in which on the same line as the current state experience factor, there appears a percentage equal to or in excess of such employer's benefit wage ratio. If no percentage equal to or in excess of such employer's benefit wage ratio appears on said line, then such employer's contribution rate shall be three and six-tenths (3.6) per centum.

TABLE

State Experience Factor	Col. 1 .5%	Col. 2 1.0%	Col. 3 1.5%	Col. 4 2.0%	Col. 5 2.5%	Col. 6 3.0%
1%	50%	100%	150%	200%	250%	300%
2	25	50	75	100	125	150
3	17	33	50	66	83	100
4	13	25	38	50	63	75
5	10	20	30	40	50	60
6	8	17	25	34	42	50
7	7	14	21	29	36	43
8	6	13	19	25	31	38
9	6	11	16	22	28	33
10	5	10	15	20	25	30
11	5	9	14	18	23	27
12	4	8	13	17	21	25
13	4	8	12	15	19	23
14	4	7	11	14	18	21
15	3	7	10	13	17	20
16	3	6	9	12	16	19
17	3	6	9	12	15	18
18	3	6	8	11	14	17
19	3	5	8	11	13	16
20	3	5	8	10	13	15
21	2	5	7	10	12	14
22	2	5	7	9	11	14
23	2	4	7	9	11	13
24	2	4	6	8	10	12
25	2	4	6	8	10	12
26	2	4	6	8	10	12
27	2	4	6	7	9	11
28	2	4	5	7	9	11
29	2	3	5	7	9	10
30	2	3	5	7	8	10
31	2	3	5	6	8	10
32	2	3	5	6	8	9
33	2	3	5	6	8	9
34	1	3	4	6	7	9
35	1	3	4	6	7	9

The contribution rate of each employer for whom no wages became benefit wages during the period under consideration and who paid no contributions upon wages for insured work during such period prior to the date specified

in Section 18 (c) (3) shall be 2.7%. The contribution rate of each employer for whom wages became benefit wages during the period under consideration but who paid no contributions on wages for insured work during such period prior to the dates specified in Section 18 (c) (3) shall be 3.6%.

(B) Any provision of this section to the contrary notwithstanding:

Each employer who has paid wages for insured work in the calendar year 1942 which exceeded by 150 per cent or more the wages for insured work payable by such employer in the calendar year 1940, shall pay contributions on wages paid for insured work in the last six months of the calendar year 1943 at the rate determined by the Director pursuant to the other provisions of this section for the calendar year 1943 if such rate is 2.7 per cent or more; if such rate is less than 2.7 per cent, then such employer shall pay contributions on wages paid by him for insured work in the last six months of the calendar year 1943 up to and including $50,000 at the rate determined by the Director for the calendar year 1943 pursuant to the other provisions of this section and at the rate of 2.7 per cent on all wages for insured work in excess of $50,000 paid in such period.

Each employer who has paid wages for insured work in the calendar year 1942 which exceeded by more than 100 per cent, but less than 150 per cent, the wages for insured work payable by such employer for the calendar year 1940 shall pay contributions on wages paid for insured work in the last six months of the calendar year 1943 at the rate determined by the Director pursuant to the other provisions of this section for the calendar year 1943 if such rate is 2 per cent or more; if such rate is less than 2 per cent, then such employer shall pay contributions on wages paid by him for insured work in the last six months of the calendar year 1943 up to and including $50,000 at the rate determined by the Director for the calendar year 1943 pursuant to the other provisions of this section and at the rate of 2 per cent on all wages for insured work, in excess of $50,000 paid in such period.

Each employer who has paid wages for insured work in the calendar year 1943 which exceeded by 150 per cent or more the wages for insured work payable by such employer in the calendar year 1940 shall pay contributions on wages paid for insured work in the calendar year 1944 at the rate determined by the Director pursuant to the other provisions of this section for the calendar year 1944 if such rate is 2.7 per cent or more; if such rate is less than 2.7 per cent, then such employer shall pay contributions on wages paid by him for insured work in the calendar year 1944 up to and including $100,000 at the rate determined by the Director for the calendar year 1944 pursuant to the other provisions of this section and at the rate of 2.7 per cent on all wages for insured work in excess of $100,000 paid in such calendar year.

Each employer who has paid wages for insured work in the calendar year 1943 which exceeded by more than 100 per cent, but less than 150 per cent, the wages for insured work payable by such employer in the calendar year 1940, shall pay contributions on wages paid for insured work in the calendar year 1944 at the rate determined by the Director pursuant to the other provisions of this section for the calendar year 1944 if such rate is 2 per cent or more; if such rate is less than 2 per cent, then such employer shall pay contributions on wages paid by him for insured work in the calendar year 1944 up to and including $100,000 at the rate determined by the Director for the calendar year 1944 pursuant to the other provisions of this section and at the rate of 2 per cent on all wages for insured work in excess of $100,000 paid in such calendar year.

Each employer who has paid wages for insured work in the calendar year 1944 which exceeded by 150 per cent or more the wages for insured work payable by such employer in the calendar year 1940 shall pay contributions on wages paid for insured work in the calendar year 1945 at the rate determined by the Director pursuant to the other provisions of this section for the calendar year 1945 if such rate is 2.7 per cent or more; if such rate is less than 2.7 per cent, then such employer shall pay contributions on wages paid by him for insured work in the calendar year 1945 up to and

including $100,000 at the rate determined by the Director for the calendar year 1945 pursuant to the other provisions of this section and at the rate of 2.7 per cent on all wages for insured work in excess of $100,000 paid in such calendar year.

Each employer who has paid wages for insured work in the calendar year 1944 which exceeded by more than 100 per cent, but less than 150 per cent, the wages for insured work payable by such employer in the calendar year 1940, shall pay contributions on wages paid for insured work in the calendar year 1945 at the rate determined by the Director pursuant to the other provisions of this section for the calendar year 1945 * if such rate is 2 per cent or more; if such rate is less than 2 per cent, then such employer shall pay contributions on wages paid by him for insured work in the calendar year 1945 up to and including $100,000 at the rate determined by the Director for the calendar year 1945 pursuant to the other provisions of this section and at the rate of 2 per cent on all wages for insured work in excess of $100,000 paid in such calendar year.

(C) For the purposes of this subsection: Benefits shall be deemed to have been paid when requisition has been made therefor by the Director upon the State Treasurer.

The term "basic amount" means the amount standing to the credit of this State's account in the unemployment trust fund as of the close of the calendar year 1942.

The term "minimum normal amount" means 60% of the basic amount.

The term "maximum normal amount" means 140% of the basic amount.

The term "current amount" shall be the amount standing to the credit of this State's account in the unemployment trust fund as of June 30, 1943 and as of June 30 of each succeeding calendar year thereafter.

For every 4% (or fraction thereof) of the basic amount by which the current amount falls below the minimum normal amount, the calculated state experience factor for the succeeding calendar year shall be increased 1% absolute.

For every 4% (or fraction thereof) of the basic amount by which the current amount exceeds the maximum normal

amount, the calculated state experience factor for the succeeding year shall be reduced 1% absolute.

(6) (A) In the determination of contribution rates for the calendar year 1943 and for each calendar year thereafter, two or more employing units which are parties to or the subject of a merger, consolidation, or other form of reorganization effecting a change in legal identity or form shall be considered and treated as a single employing unit if the Director finds that (a) immediately after such change the employing enterprises of the predecessor employing unit or units are continued solely through a single employing unit as successor thereto, and (b) immediately after such change such successor is owned or controlled, directly or indirectly, by legally enforceable means or otherwise, by the same interests as the predecessor employing unit or units immediately preceding the date of reorganization.

Whenever two or more such reorganizations occur in succession, all the employing units which are parties to or the subject of the last reorganization, if any, which took place prior to January 1, 1943, and all the employing units which are parties to or the subject of any such successive reorganization which occurred on or after January 1, 1943, shall be considered and treated as a single employing unit for the purposes of determining contribution rates, if the Director finds that both conditions (a) and (b) above exist with respect to each reorganization in the series of successive reorganizations.

(B) For the calendar year in which a reorganization provided for in the preceding paragraph occurs, the contribution rate of any such successor employing unit for whom a rate of contribution has previously been determined for that calendar year shall continue to be that employer's contribution rate. The rate of any such successor employing unit for whom a rate of contribution has not previously been determined for that calendar year shall be determined in the following manner:

(i) If there is only one predecessor employer involved in such reorganization, that predecessor employer's rate of contribution for the year in which such reorganization

occurs shall be the rate of the successor employing unit for the calendar year in which such reorganization occurred;

(ii) If there are two or more predecessor employing units involved in such reorganization and all the predecessor employers have the same contribution rate for the year in which such reorganization occurs, that contribution rate shall be the rate of the successor employing unit for the calendar year in which such reorganization occurred;

(iii) If there are two or more predecessor employing units involved in such reorganization having different contribution rates for the year in which such reorganization occurs, a rate of contribution for the successor employing unit for the calendar year in which such reorganization occurred, shall be determined as follows: If such reorganization occurred prior to January 1, 1944, then for the purpose of determining such rate for the calendar year 1943 the benefit wage ratio of the successor employer shall be a percentage equal to the total of the benefit wages of all the parties to the reorganization for the three immediately preceding calendar years divided by the total wages for insured work for the same period of all the employing units which were parties to the reorganization on which contributions were paid to the Director on or before January 31, 1943. If such reorganization occurred on or after January 1, 1944, then for the purpose of determining such rate for the calendar year in which such reorganization occurred, the benefit wage ratio of the successor employer shall be a percentage equal to the total of the benefit wages of all parties to such reorganization for the 36 consecutive calendar month period ending June 30 of the calendar year immediately preceding the date of such reorganization, divided by the total wages for insured work for the same period, on which contributions were paid by all the employing units which were parties to such reorganization to the Director on or before July 31 immediately following the end of such period. In computing a rate for an employer under the provisions of this paragraph the State Experience Factor shall be the one applicable in the determination of contribution rates for the year in which such reorganization occurred.

(7) (A) The Director shall periodically furnish each employer with a statement of the wages of his workers or former workers which became his benefit wages together with the names of such workers or former workers, and any such statement in absence of an application for revision thereof within 30 days from the date of mailing of such statement to his last known address shall be conclusive and final upon the employer for all purposes and in all proceedings whatsoever. Such application for revision shall be in the form and manner prescribed by regulation of the Director. If the Director shall deem any application for revision insufficient, he shall rule such insufficient application stricken and shall serve notice of such ruling and the basis therefor upon the employer. Such ruling shall be final and conclusive upon the employer unless he shall file a sufficient application for revision within ten days from the date of service of notice of such ruling. Upon receipt of a sufficient application for revision of such statement within the time allowed, the Director shall order such application allowed in whole or in part, or shall order that such application for revision be denied and shall serve notice upon the employer of such order. Such order of the Director shall be final and conclusive at the expiration of ten days from the date of service of such notice unless the employer shall have filed with the Director a written protest and a petition for hearing, specifying his objections thereto. Upon receipt of such petition within the ten days allowed, the Director shall fix the time and place for a hearing and shall notify the employer thereof. At any hearing held as herein provided, the order of the Director shall be prima facie correct and the burden shall be upon the protesting employer to prove that it is incorrect. All of the provisions of Section 25 of this Act applicable to hearings conducted pursuant to such section and not inconsistent with the provisions of this subsection shall be applicable to hearings conducted pursuant to this subsection. No employer shall have the right to object to the benefit wages with respect to any worker as shown on such statement unless he shall first show that such benefit wages arose as a result of benefits paid to such worker in accordance with a finding, recon-

sidered finding, determination or reconsidered determination pursuant to Section 9 of this Act to which such employer was a party entitled to notice thereof as provided by Section 9 of this Act, and shall further show that he was not notified of such finding, reconsidered finding, determination or reconsidered determination in accordance with the requirements of Section 9 of this Act. Provided that nothing herein contained shall abridge the right of any employer at such hearing to object to such statement of benefit wages on the ground that it is incorrect by reason of a clerical error made by the Director or any of his employees. The employer shall be promptly notified, by mail, of the Director's decision. Such decision shall be final and conclusive unless review is had within the time and in the manner provided by Section 25 (a) (2) of this Act.

(B) Each rate determination for the calendar year 1943 made as in this Section provided shall be based upon the benefit wages of each employer for the three preceding calendar years as they appeared upon the records of the Director on February 25, 1943.

(C) The Director shall promptly notify each employer of his rate of contributions for each calendar year as determined pursuant to this Section, by mailing notice thereof to his last known address. Such rate determination shall be final and conclusive upon the employer for all purposes and in all proceedings whatsoever, unless within 15 days after mailing of notice thereof, the employer files with the Director an application for review of such rate determination, setting forth his reasons in support thereof. Such application for review shall be in the form and manner prescribed by regulation of the Director. If the Director shall deem any application for review insufficient, he shall rule such insufficient application stricken and shall serve notice of such ruling and the basis therefor upon the employer. Such ruling shall be final and conclusive upon the employer unless he shall file a sufficient application for review within ten days from the date of service of notice of such ruling. Upon receipt of a sufficient application for review within the time allowed, the Director shall order such application for review allowed in whole or in part, or shall order that such

application for review be denied, and shall serve notice upon the employer of such order. Such order of the Director shall be final and conclusive at the expiration of ten days from the date of service of such notice unless the employer shall have filed with the Director a written protest and a petition for hearing, specifying his objections thereto. Upon receipt of such petition within the ten days allowed, the Director shall fix the time and place for a hearing and shall notify the employer thereof. At any hearing held as herein provided, the order of the Director shall be prima facie correct and the burden shall be upon the protesting employer to prove that it is incorrect. All of the provisions of Section 25 of this Act applicable to hearings conducted pursuant to such Section and not inconsistent with the provisions of this subsection shall be applicable to hearings conducted pursuant to this subsection. In any such proceeding the employer shall be barred from questioning the amount of the benefit wages as shown on any statement of benefit wages which forms the basis for the computation of such rate, unless such employer shall prove that he was not, as heretofore provided, furnished with the statement of benefit wages containing the benefit wages which he maintains are erroneous. In such event, the employer shall have the same rights to revision of such statement of benefit wages in such proceedings as provided in this Section with reference to revision of statements of benefit wages. Upon the completion of such hearing the employer shall be promptly notified by the Director by mail of his decision and such decision shall be final and conclusive for all purposes and in all proceedings whatsoever unless review is had within the time and in the manner provided by Section 25 (a) (2) of this Act.

(D) Whenever service of notice is required by this subsection such notice may be given and be complete by depositing the same with the United States Mail addressed to the employer concerned at his last known address. If represented by counsel in the proceedings before the Director then service of notice may be made upon such employer by mailing same to such counsel.

(d) Study of Experience Rating. The Board of Unemployment Compensation and Free Employment Office Advisors created by Section 6 of "The Civil Administrative Code of Illinois," approved March 7, 1917, as amended, is hereby authorized and directed to study and examine the present provisions of this Act providing for experience rating, in order to determine whether the rates of contributions for the calendar years 1943 and thereafter will operate to replenish the amount of benefits paid and to determine the effect of experience rating upon labor and industry in this State.

The Board shall submit its findings and recommendations based thereon to the sixty-third General Assembly, including, if it is found that the rates for 1943 and thereafter will not provide for replenishment of benefits paid out, a recommendation of such adjustment of rates as will accomplish this purpose. The Board may employ such experts and assistants as may be necessary to carry out the provisions of this subsection. All expenses incurred in the making of this study, including the preparation and submission of its findings and recommendations, shall be paid in the same manner as is provided for the payment of costs of administration of this Act.

THE UNEMPLOYMENT COMPENSATION ACT

§ 1. Declaration of Public Policy.
§ 2. Definitions.
§ 3. Election and Termination of Coverage.
§ 4. Payment of Benefits.
§ 5. Part Time Workers.
§ 6. Eligibility for Benefits.
§ 7. Ineligibility for Benefits.
§ 8. Repealed.
§ 9. Filing Claim for Benefits.
§ 10. Powers of Director or Board of Review.
§ 11. Testimony—Immunity.
§ 12. Attendance of Witnesses—Production of Papers—Depositions.
§ 13. Copies of Proceedings.

§ 14. Review by the Courts.
§ 15. Wages and Compensation of Attorneys.
§ 16. Waiver Agreement Void.
§ 17. Assignment of Benefits—Exemption.
§ 18. Payment of Contributions.
§ 18a. Repealed.
§ 19. Agreement to Contributions by Employees Void.
§ 20. Duties and Powers of the Director.
§ 21. Cooperation with Social Security Board.
§ 22. Records and Reports—Disclosure of Information.
§ 23. Handling of Funds—Bond—Accounts.
§ 24. Unemployment Compensation Administration Costs.
§ 25. Determination and Assessment of Contributions by the Director—and Collection Thereof—Refunds.
§ 25½. Evidence and Procedure.
§ 26. Lien Upon Assets of Employer.
§ 26½. Liability for Payment of Employer's Delinquent Contributions by Others.
§ 27. State-Federal Cooperation.
§ 28. Reciprocal Benefit Arrangements.
§ 29. Violations and Penalties.
§ 30. Moneys and Increments to be Sole Source of Benefits Under Act—Non Liability of State.
§ 31. Separability of Provisions.
§ 32. Saving Clause.
§ 33. Title of Act.

An Act *in relation to a system of unemployment compensation.*

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Declaration of Public Policy.) As a guide to the interpretation and application of this Act the public policy of the State is declared as follows: Economic insecurity due to involuntary unemployment has become a serious menace to the health, safety, morals and welfare of the people of the State of Illinois. In voluntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to pre-

vent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. Poverty, distress and suffering have prevailed throughout the State because funds have not been accumulated in times of plentiful opportunities for employment for the support of unemployed workers and their families during periods of unemployment, and the taxpayers have been unfairly burdened with the cost of supporting able-bodied workers who are unable to secure employment. Farmers and rural communities particularly are unjustly burdened with increased taxation for the support of industrial workers at the very time when agricultural incomes are reduced by lack of purchasing power in the urban markets. It is the considered judgment of the General Assembly that in order to lessen the menace to the health, safety and morals of the people of Illinois, and to encourage stabilization of employment, compulsory unemployment compensation upon a statewide scale providing for the setting aside of reserves during periods of employment to be used to pay benefits during periods of unemployment, is necessary.

APPENDIX "B"

S. Buchsbaum & Co.

Opinion Rendered January 17, 1945

Docket No. 28416—Agenda 60—November, 1944

S. Buchsbaum & Co., et al., *Appellants*,

v.

Robert L. Gordon, Director of Labor, *Appellee*

Mr. Justice Smith delivered the opinion of the Court: This cause originated in a claim for refund or credit, filed with the Director of the Department of Labor, under section 25(d) of the Unemployment Compensation Act. The claim was filed by S. Buchsbaum & Co. The Director denied a refund and dismissed the claim. The claimant re-

moved the cause to the circuit court of Cook county by certiorari. In the circuit court, thirteen mandamus suits, brought by various employers against the Director, were consolidated with the certiorari case. The petitions for mandamus in each prayed for a writ ordering the Director of Labor to expunge from his records, kept pursuant to the Unemployment Compensation Act, the entry fixing the contribution rate determined for each petitioner for the calendar year 1944. The circuit court, upon a hearing, confirmed the action of the Director disallowing the claim for credit or refund, and quashed the writ of certiorari. In the mandamus cases, the motions of the Director to strike were sustained, and the petitions were dismissed. This appeal seeks a review of all of those orders.

In all of the cases, the issue was raised as to whether section 18(c)(5)(B) of the Unemployment Compensation Act, as amended in 1943, constitutes any part of the law of Illinois. It is contended that said section of the Unemployment compensation Act, as amended in 1943, was repealed by the subsequent passage of another amendment to the same section, at the same session. It is also contended that said section violates various provisions of the constitution of the State and of the United States. In this opinion, S. Buchsbaum & Co. and the thirteen petitioners in the mandamus cases will be referred to, collectively, as appellants.

The Unemployment Compensation Act, originally enacted in 1937, creates a fund administered by the Director of Labor, available for the payment of unemployment compensation. This fund is maintained by the payment of contributions by employers subject to the act. The portion of the act dealing with the rates and payment of contributions by employers is section 18. Originally, section 18 imposed an arbitrary statutory rate of 2.7 per cent on the wages paid by each employer subject to the act. Thereafter, section 18 was amended so as to provide that the Director should determine the rate of contributions for all employers, based upon their employment experience and upon the employment experience in the State at large. The formula for computing and fixing the variable experience

rates of contribution of employers for each year was set out in section 18(c).

In 1941, the legislature, obviously recognizing the need of a study of the provisions of the act relative to experience rating, enacted section 18(d) of the Unemployment Compensation Act. (Ill. Rev. Stat. 1941, chap. 48, par 234.) By this act, the Board of Unemployment Compensation and the Free Employment Office Advisors, created by section 6 of the Civil Administrative Code, were authorized and directed to study and examine the provisions of the Unemployment Compensation Act providing for experience rating, in order to determine whether the rates of contributions for the calendar year 1943, and each year thereafter, would be sufficient to replenish the amount of benefits paid out, and to determine the effect of experience rating upon labor and industry. They were directed to submit their findings and recommendations, based on such findings, to the sixty-third General Assembly. Such investigation was conducted and findings made. A report was transmitted to the Governor and to both Houses of the General Asembly on April 27, 1943. As a basis for determining the purpose of the amendments hereinafter considered, and the evils sought to be remedied, a quotation from that report is pertinent:

"These war expanded employers under the experience rating plan are being assigned reduced rates of contributions which reduced rates of contribution were earned on the basis of the three prior years of experience which included both non-war and war production and represented much smaller pay rolls. The result is that these war expanded employers during this period would pay contributions at these reduced rates on increased pay rolls and would thus not bear a fair share of the potential post-war burden. Clearly, when these employers contribute at reduced rates they cannot contribute an amount sufficient to take care of the potential liability created by their workers employed in these war-expanded industries, who are acquiring benefit rights which are many times greater than the contributions which are being or will be paid on their wages. Moreover, even if these employers are assigned higher rates under the experience rating plan in the post-war

period, such higher rates on reduced pay rolls will not result in a sufficient yield of contributions to meet the benefits paid to the workers laid off by these employers."

On May 6, 1943, two bills were introduced in the Senate. These bills were numbered 398 and 399. Senate Bill No. 398 amended section 18, only, of the Unemployment Compensation Act. Senate Bill No. 399 amended various sections of said act, including section 18. The amendment of section 18, as set out in Senate Bill No. 398, was substantially identical with the amendment of section 18 made by Senate Bill No. 399, except that section 18, as amended by Senate Bill No. 398 contained what is referred to in the record and in the briefs as the "War Risk Amendments." Said amendments will be hereinafter so designated and referred to in this opinion. By these amendments, it was provided that "(B) Any provisions of this section to the contrary notwithstanding," certain war risk rates were to be paid for the last six months of the calendar year 1943, applicable to wages paid in excess of $50,000, and for the calendar years 1944 and 1945, applicable to wages paid in excess of $100,000 by certain employers subject to the act.

Treating the War Risk Amendments as a part of section 18, the Director made contribution rate determinations for appellants for the year 1944, in accordance with those amendments. With respect to S. Buchsbaum & Co., and all of the petitioners in the mandamus suits, except four, he determined in each case a rate based upon benefit experience ranging between .5 per cent and 1.5 per cent, applicable to wages paid during 1944, not in excess of $100,000, and an additional rate of 2.7 per cent applicable to wages paid during the year 1944, in excess of $100,000. The record shows that the pay roll of each had increased, in the calendar year 1943, more than 150 per cent over their respective pay rolls for the calendar year 1940. As to the petitioners in the mandamus suits, not included in the above computation, the Director fixed their rates at .5 per cent applicable to the first $100,000 of wages paid during the year 1944, and an additional rate of 2 per cent, applicable to wages paid in excess of $100,000. The record shows that the pay

roll of each of these petitioners increased in the calendar year 1943, more than 100 per cent but less than 150 per cent over their respective pay rolls for the calendar year 1940. The computations made by the Director are not questioned as to their mathematical accuracy. Nor is there any question raised that such computations were made in accordance with the War Risk Amendments of section 18 of the Unemployment Compensation Act, as amended by Senate Bill No. 398. The sole question presented on this branch of the case is whether section 18, as amended by Senate Bill No. 398, was repealed by the passage of Senate Bill No. 399 later on the same day. The legislative history of Senate Bills Nos. 398 and 399 is as follows:

As already observed, the two bills were introduced on the same day. Senate Bill No. 398 was passed by the Senate without amendment, on June 16, 1943. It was passed by the House without amendment, during the morning session of June 24, 1943. Senate Bill No. 399 was passed by the Senate on June 9, 1943. It was amended in the House, and as amended, passed by the House during the morning of June 24, 1943, immediately preceding the passage of Senate Bill No. 398. It was then returned to the Senate for concurrence in the House amendment. The House amendment to Senate Bill No. 399 was concurred in by the Senate on the evening of June 24, 1943. Both bills were approved by the Governor on June 30, 1943.

It is the contention of appellants that the effect of the concurrence by the Senate, in the House amendment to Senate Bill No. 399, being later in point of time, repealed section 18, as amended by Senate Bill No. 398, which was finally passed by the House earlier on the same day.

The rule as to the effect of the passage of different amendments to the same statute at the same session of the legislature is well defined. The rule is that if the two amendments are so inconsistent that both cannot operate and be given effect, the later amendment in point of time controls. In the case of *People ex rel. Heaton* v. *Illinois Central Railroad Co.*, 295 Ill. 408, this Court considered two amendments to section 112 of the Roads and Bridges Act, relating to the rate at which taxes could be levied. The section

was twice amended at the same session of the General Assembly. Each amendment provided a different rate. It was held that the two acts, being inconsistent, could not both operate or be given effect, and the amendment passed later, in point of time, repealed by implication the amendment passed earlier in point of time. It was there said: "Two acts that are passed at the same session of the legislature are not to be construed as inconsistent if it is possible to construe them otherwise, but where it is impossible to give effect to both acts the latest in point of time will prevail."

The same question was presented in *People ex rel. Hines v. Baltimore and Ohio Southwestern Railroad Co.*, 366 Ill. 318. In that case, section 25 of the Counties Act, fixing the rate at which taxes could be levied, was amended three times during the same session of the General Assembly. Each amendment fixed a different rate. It was held that the last act passed, being the latest expression of the legislature, was the one which must be given effect, and that the two earlier amendments were repealed by implication. It was there said: "It is a general rule that where an act, or section of an act, is amended so as to read as it is repeated in the amendatory act, all such portions of the old act or section as are not repeated in the new act are repealed without any express words for that purpose, but all such portions of the old law as are retained, either literally or substantially, are regarded as a continuation of the old law and not as a new enactment."

It is equally well settled that amendments are to be construed together and with the original act to which they relate as constituting one law and as a part of a coherent system of legislation. (*City of Altamont v. Baltimore and Ohio Railroad Co.*, 348 Ill. 339; *People ex rel. Adams v. New York, Chicago and St. Louis Railroad Co.*, 316 Ill. 452; *Spiehs v. Insull*, 278 Ill. 184.) The statement in *Klemme v. Drainage Dist. No. 5*, 380 Ill. 221, that a later law which is merely a re-enactment of a former law does not repeal an intermediate act which has qualified or limited the first one but the intermediate act will be deemed to remain in force and to qualify or modify the new act in the same manner as it did the first, (on the authority of 25 R. C. L. p. 937,

par. 187,) is subject to the modification that the two acts are not so inconsistent that both cannot stand and be given effect. 50 Am. Juris. p. 558, sec. 553.

Where acts are passed at the same session, containing conflicting provisions, the whole record of the legislation will be examined in order to ascertain the legislative intent which, if ascertained, must be given effect, regardless of priority of enactment. (*Mette v. Feltgen*, 148 Ill. 357.) The provisions of any statute, so far as they are the same as those of any prior statute, must be construed as a continuation of such prior provisions and not as a new enactment. (Ill. Rev. Stat. 1943, chap. 131, par. 2.) It is also the rule that when the legislature enacts an amendatory statute providing that a certain act shall be amended so as to read as repeated in the amendatory act, such portions of the old law as are repeated in the new act, either literally or substantially, are to be regarded as a continuation of the old law and not the enactment of a new law on that subject. (*People v. Lloyd*, 304 Ill. 23; *Svenson v. Hanson*, 289 Ill. 242.) In all cases the primary question is the intention of the legislature, rather than the technical priority of the passage of the acts.

The record shows that the War Risk Amendments were recommended and strongly urged by the Board of Unemployment Compensation and Free Employment Office Advisors, in their report made to the Governor and to both Houses of the General Assembly. In this report, the amendments were said to be absolutely necessary to protect the solvency of the unemployment compensation fund during the post-war period of decreasing pay rolls and increasing claims for compensation payments. The same facts were forcibly stressed in a statement made on the hearing on Senate Bill No. 398, before the Senate Committee on Industrial Affairs, by the Commissioner of Placement and Unemployment Compensation of the Department of Labor. The report of the Board of Unemployment Compensation and Free Employment Office Advisors, made to the Governor and the General Assembly, after reviewing the history of the Unemployment Compensation Act, and the prior amendments thereto, made separate

recommendations as to the War Risk Amendments to section 18, and as to certain administrative amendments of minor importance, contained in Senate Bill No. 399. The record also shows that certain representatives of the Federal government were opposing the War Risk Amendments. Their objection was obviously made because many war expanded employers were operating under government contracts on a "cost plus" basis, and any increase in contributions would increase the cost to be ultimately paid by the Federal government.

The record justifies the conclusion that the reason the two acts, the one including the War Risk Amendments to section 18, and the other omitting those amendments, were introduced at the same time was the fear that the bill containing the War Risk Amendments might be defeated. Obviously, the purpose in introducing the two separate bills was to insure the passage of the administrative amendments to section 18, made by Senate Bill No. 399, regardless of the result of the final vote on Senate Bill No. 398. In other words, it was intended to separate the War Risk Amendments entirely from the noncontroversial administrative amendments contained in Senate Bill No. 399.

The legislative history shows that the two acts were treated as companion measures in both Houses of the General Assembly. They were introduced by the same member. When the bills were introduced in the Senate simultaneously both were referred to the Committee on Industrial Affairs. The two bills were reported back by the committee with the recommendation that both be passed, and they were ordered to a first reading. On June 3, 1943, on motion, the two bills were taken up, one immediately after the other, read at large the first time, and ordered to a second reading. On June 8, 1943, Senate Bill No. 398 was taken up and read at large the second time and ordered transcribed and typed for third reading. Immediately thereafter, Senate Bill No. 399 was taken up and read at large the second time. On second reading, a slight amendment was made to Senate Bill No. 399, which is wholly unimportant here. It was then ordered that Senate Bill No. 399 be transcribed and typed for a third reading. On June 9, 1943, Senate Bill No. 398 was read a

third time and, on motion, its consideration was postponed. Immediately thereafter, Senate Bill No. 399 was taken up and read a third time and passed. On June 16, 1943, Senate Bill No. 398 was passed.

The House Journal shows that on June 15, 1943, Senate Bill No. 399 was taken up and ordered to a first reading. On June 16, the bill was read at large the first time and ordered to second reading without reference. Shortly thereafter, and on the same day, Senate Bill No. 398 was taken up and ordered to a first reading. On June 17, 1943, Senate Bill No. 399 was read a second time and after an amendment to section 4 was adopted, increasing the amount of weekly benefits to workers eligible for compensation, was ordered to a third reading. Shortly thereafter, on the same day, Senate Bill No. 398 was taken up and read for the first time and ordered to a second reading without reference. On June 22, 1943, Senate Bill No. 399 was placed on third reading. On the same day, Senate Bill No. 398 was read the second time and ordered to third reading. On June 24, 1943, Senate Bill No. 399 was read the third time and passed. The clerk was ordered to inform the Senate and ask its concurrence in the House amendment to said bill. Immediately thereafter, on the same day, Senate Bill No. 398 was read a third time and passed.

The Journal of the Senate shows that on June 24, 1943, the Senate concurred in the House amendment to Senate Bill No. 399. Both bills were thereafter signed by the speaker of the House and the President of the Senate.

It thus appears that Senate Bill No. 399 was finally passed by the House on June 24, 1943, immediately preceding the final passage by the House of Senate Bill No. 398. However, inasmuch as there had been an amendment in the House to Senate Bill No. 399, it was necessary that that bill be sent back to the Senate for its concurrence in the House amendment. This concurrence was given on the same day, and only a few hours after the passage of Senate Bill No. 398, in the House. The result was that the final action of the Senate on Senate Bill No. 399, was later in point of time than the final action of both Houses on Senate Bill No. 398.

The rule that where two conflicting enactments are passed at the same session, the latest enactment in point of time

will prevail, as well as all other rules of construction dealing with repeals by implication, are mere canons of construction. Such canons are only aids to the ascertainment of the legislative intent and must yield to such intent if the same be otherwise. They should never be followed to the extent of defeating or overriding the definite intent of the legislature. *Illinois Central Railroad Co. v. Franklin County*, 387 Ill. 301.

In view of the legislative history of the two enactments appearing in the record, the intention to repeal the War Risk Amendments contained in section 18, as amended by Senate Bill No. 398, by the final action of the Senate in concurring in the House amendment to Senate Bill No. 399, cannot be assumed. The contention that the legislature intended that the later enactment in point of time should repeal Senate Bill No. 398, which was finally passed only a few hours earlier on the same day, cannot be sustained. The Journals of the two Houses show that the two acts were considered together. After mature consideration they were both passed. To assume that it was the intention of the legislature to repeal Senate Bill No. 398, by the final action taken in the Senate concurring in the House amendment to Senate Bill No. 399, is to impute to the legislature an absurdity which is not justified by the record. (*Ketcham v. Board of Education*, 324 Ill. 314; *People v. Day*, 321 Ill. 552; *Village of Glencoe v. Hurford*, 317 Ill. 203.) That it was not the intent of the legislature to repeal Senate Bill No. 398, by the later action of the Senate in concurring in the House amendment to Senate Bill No. 399, is further demonstrated by the fact that in both Houses, Senate Bill No. 398 was passed after the passage of Senate Bill No. 399. It must, therefore, be assumed that it was the intention of the legislature that both enactments should be operative and given effect.

This brings us to the question of whether the two enactments are so inconsistent and irreconcilable that both can not stand and be given effect. The rule is that when two statutes pertaining to the same subject matter are passed at the same session of the legislature, they will both be upheld unless they are so antagonistic that both cannot oper-

ate. *People ex rel. Gill v. Devine Realty Trust,* 366 Ill. 418; *People ex rel Reynolds v. Chicago, Burlington and Quincy Railroad Co.* 295 Ill. 191; *Hoyne v. Danisch,* 264 Ill. 467.

The provisions of section 18 of the Unemployment Compensation Act relative to the variable rates of contributions to be made by employers, as that act existed prior to any of the amendments of 1943, provided that for each calendar year, commencing after December 31, 1942, such contribution rates should be determined by the Director in accordance with the formula set out in said section 18. The variable rates provisions of the act first became effective on January 1, 1943. Section 18, relating to the rates of contributions by employers, provided that for each calendar year, commencing after December 31, 1942, the contribution rate for each employer should be computed in accordance with the formula set out in that section. The corresponding provisions in section 18, as amended by Senate Bill No. 399, provided the same method and set out the same formula for fixing the rates for the calendar year 1944 and subsequent years. It is, therefore, apparent that it was not the purpose of Senate Bill No. 399 to make any amendments to the existing provisions relating to the rates of contribution as contained in said section prior to any of the 1943 amendments. While it is true that section 18 was set out at length in the amendment contained in Senate Bill No. 399, this was necessary in order to comply with the requirements of section 13 of article IV of the constitution that the amended section be inserted at length in the new act. All of the provisions relating to the rates of contribution to be paid, and the method of ascertaining those rates contained in the act as it existed prior to the 1943 amendments were substantially repeated in the amendment to section 18 in Senate Bill No. 399. Those provisions of the existing act which were repeated, or substantially repeated, in the amendment of section 18 contained in Senate Bill No. 399, must be regarded as a continuation of such prior provisions and not as a new enactment. Ill. Rev. Stat. 1943, chap. 131, par. 2; *People v. Lloyd,* 304 Ill. 223; *Svenson v. Hanson,* 289 Ill. 242.

Turning to Senate Bill No. 398, which was an amendment of section 18 only, we find that all of the provisions of section 18, as it existed prior to any of the 1943 amendments, and all of the provisions of the amendment of said section contained in Senate Bill No. 399, were substantially repeated in Senate Bill No. 398. But, there was also inserted in Senate Bill No. 398, the War Risk Amendments. In Senate Bill No. 398, after setting out in substantially the same language all of the provisions contained in the existing act relative to the fixing of rates of contribution and the formula therefor, the War Risk Amendments were inserted. Under those amendments it was provided that the variable rates of contribution, as ascertained according to the formula set out in that section of the act, should be applicable to the last six months of 1943, and to the years 1944 and 1945. This, however, was followed by the provision that "Any provisions of this section to the contrary notwithstanding" each employer, who has paid wages in the calendar year 1942 which exceeded by 150 per cent the wages paid in the calendar year 1940, shall pay contributions on the wages paid in the last six months of the calendar year 1943 at the variable rate on the first $50,000 and 2.7 per cent on the excess over $50,000. Those whose payment of wages in the calendar year 1942 exceeded by more than 100 per cent but less than 150 per cent the wages paid in the calendar year 1940 were required to pay, for the last six months of the calendar year 1943, the variable rate fixed by the Director on the first $50,000 of wages paid, and 2 per cent on the excess. It is further provided that employers who paid wages in the calendar year 1943, which exceeded by 150 per cent or more the wages paid for the calendar year 1940, shall pay contributions on wages paid in the calendar year 1944 at the variable rate determined by the Director under the formula set forth in the act on the first $100,000 of wages paid, and 2.7 per cent on wages paid in excess of $100,000. And, further, that for the calendar year 1944, where the employer had paid wages in the year 1943 exceeding by more than 100 per cent but less than 150 per cent of the wages paid in 1940, the rate of contribution should be the rate determined by the Director in accordance with the

provisions of the formula on the first $100,000 of the pay roll, and 2 per cent on the excess over $100,000. A like provision was made with reference to the rates to be paid in 1945, based upon a comparison of the wages paid in 1944 with the wages paid in 1940. These are the so-called War Risk Amendments.

It will thus be seen that section 18, as amended by both Senate Bill No. 398 and Senate Bill No. 399, provided for the determination of the variable rate by the Director for each employer by the same formula and method. This rate is to be based upon the experience of each employer and upon the experience in the State at large. The same formula was set out in the existing act, in Senate Bill No. 398, and in Senate Bill No. 399, for the determination of such variable rates by the Director. The only difference is that by the War Risk Amendments contained in Senate Bill No. 398, the last six months of the year 1943 and the years 1944 and 1945 were excepted from the general provisions of the act, as to the rate of contributions to be paid by those employers whose pay rolls had increased in the years 1942, 1943 and 1944, more than 100 per cent over the year 1940. In other words, those employers whose pay rolls for the year 1943 had exceeded their pay rolls for the year 1940 by 100 per cent, and not more than 150 per cent, were required to pay, for the year 1944, the variable rate fixed by the Director on the first $100,000 of the pay roll, and 2 per cent on the excess. Those employers whose pay rolls in 1943 exceeded by 150 per cent or more the wages paid in 1940 were required to pay the variable rate determined by the Director on the first $100,000 of the wages paid in the year 1944, and 2.7 per cent on the excess.

For the year 1945, those employers who had paid wages in the year 1944 in excess of 100 per cent but less than 150 per cent more than the wages paid in 1940 were required to pay at the variable rate fixed on the first $100,000 of wages paid in 1945, and 2 per cent on the excess. Those employers whose pay rolls in 1944 exceeded by 150 per cent or more the wages paid in 1940 were required to pay, in the year 1945, the variable rate fixed on the first $100,000 of the pay roll, and 2.7 per cent on the excess.

The purpose of the War Risk Amendments and the intention in passing the same, as appears from the record, was to avoid insolvency of the unemployment compensation fund during the post-war period when pay rolls will normally decrease and claims for unemployment compensation increase. The additional rates were to be imposed upon employers whose pay rolls had expanded more than 100 per cent due to war conditions.

It is our conclusion that the two amendments are not so contradictory or inconsistent that both cannot be given effect. As already observed, the purpose of Senate Bill No. 399 was to make certain minor amendments and changes in section 18, which in nowise related to, or disturbed or changed the provisions contained in the existing act with reference to the rates of contributions of employers to the unemployment compensation fund. In compliance with the constitution, the section amended was set out at length in the new enactment. Senate Bill No. 398 made the same amendments, but, in addition thereto, also contained the War Risk Amendments. Under these amendments the rates of contribution fixed under section 18, as it existed prior to the 1943 amendments, and as re-enacted in Senate Bill No. 399, were continued. But, employers who paid out wages, in the years 1942, 1943 and 1944, 100 per cent or more in excess of the wages paid by them in the year 1940 were given the benefit of the variable rates fixed by the Director, for the last six months of the year 1943, only on the first $50,000 of wages paid. On the excess over $50,000, they were required to pay a higher rate. For the years 1944 and 1945, they were given the benefit of the variable rates only on the first $100,000 of the pay roll. On the excess over $100,000, they were required to pay a higher rate. In other words, such employers were temporarily lifted out of the general provisions of section 18 with reference to the contribution rates for those years, and were required to pay a higher rate on the wages paid in excess of $50,000 in the last six months of 1943, and on the excess over $100,000 in the years 1944 and 1945.

The amendment of section 18, made by Senate Bill No. 399, was but a continuation of the existing provisions of that

section. The War Risk Amendments in Senate Bill No. 398 constituted amendments to section 18 as it existed before the passage of Senate Bill No. 399, and as repeated in that amendment in compliance with the constitutional mandate that the amended section be set out at length in the new act. Section 18, as amended by Senate Bill No. 398, is not so inconsistent with that section as amended by Senate Bill No. 399 that both cannot stand and be given effect. The effect of the War Risk Amendments in Senate Bill No. 398 was to modify section 18 as it originally existed and as re-enacted by Senate Bill No. 399 as a continuance of the same section of the existing act. The War Risk Amendments contained in section 18, as amended by Senate Bill No. 398, are effective to modify and qualify the provisions of the original act relative to the rates of contribution, and those provisions as re-enacted and set out at length in section 18, as amended by Senate Bill No. 399. Under this construction, both amendments can stand and be given effect.

This brings us to the contention of appellants that the War Risk Amendments denied to them the equal protection of the law, in violation of section 1 of the fourteenth amendment to the constitution of the United States; that said amendments constitute special legislation, in violation of section 22 of article 4 of the constitution of Illinois, and impose a burden upon employers who contribute to the unemployment compensation fund which is not uniform as to the class upon which it operates, in violation of section 1 of article IX of said State constitution.

We think the contention that the amendments constitute a denial of the equal protection of the law, in violation of the fourteenth amendment, is completely answered by what is said in the opinion of the Supreme Court of the United States in *Carmichael* v. *Southern Coal and Coke Co.* 301 U. S. 495, 57 L. ed. 868, in sustaining the Unemployment Compensation Act of the State of Alabama. With reference to an attack upon a classification of employers, it was there said: "Distinctions in degree, stated in terms of differences in number, have often been the target of attack, see *Booth* v. *Indiana*, 237 U. S. 391, 397, 35 S. Ct. 617, 59 L. ed. 1011. It is argued here, and it was ruled by the

court below, that there can be no reason for a distinction, for purposes of taxation, between those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as if marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not."

The contention that the War Risk Amendments are special legislation and impose upon the employers who are required to contribute to the unemployment compensation fund a burden which is not uniform as to the class upon which it operates, is based upon the classification of employers contained in the amendments. Under the amendments, the determining factor as to whether an employer shall pay his experience variable rate on his entire pay roll or whether that rate shall be applied only to the wages paid which are not in excess over $100,000, and a higher rate on the excess over $100,000, is based upon a comparison of the wages paid during the next preceding calendar year with the wages paid during the calendar year 1940. It is obvious that the calendar year 1940 was selected as the basic year for comparison with the wages paid in future years because it was assumed that the calendar year 1940 was a normal year, uninfluenced by wartime conditions.

In the determination of the questions raised by this objection, the legislative history and background of the amendments, as well as the potential evils sought to be obviated, already referred to, must be kept in mind. The effect of the amendments is to classify employers into three classes. (1) Those employers who did not pay out as much as $100,000 in wages during the calendar year for which the rate is to be determined. Such employers pay according to their variable experience rate, determined by the Director, on their entire pay roll. (2) Those employers who paid wages during the next preceding calendar

year which exceeded by more than 100 per cent but less than 150 per cent the wages paid for the calendar year 1940. Employers within this class pay their experience variable rate fixed by the Director on the first $100,000 of wages paid during the current calendar year. On the excess over $100,000, they pay at a war risk rate of 2 per cent. (3) Employers who paid wages during the next preceding calendar year which exceeded by 150 per cent or more the wages paid in the calendar year 1940. Such employers pay the variable experience rate fixed by the Director on the first $100,000 of wages paid during the current year, and a war risk rate of 2.7 per cent on the excess over $100,000.

It is argued that this is an unlawful and improper classification. It is contended that employers whose pay rolls have expanded in excess of 100 per cent are in no different class, with respect to the objectives and purposes of the Unemployment Compensation Act, than employers whose entire pay roll expansion is no greater than 99 per cent in excess of the wages paid in the calendar year 1940. Similarly, it is contended that an employer whose pay roll expansion has exceeded 150 per cent over the 1940 pay roll, with respect to that portion of his current pay roll between 100 per cent and 150 per cent greater than his 1940 pay roll, is in no different position than the employer whose pay roll expanded 100 per cent, but less than 150 per cent. It is said that an employer subject to the war risk rate of 2.7 per cent on the excess over $100,000 of his pay roll should only pay such war risk rate upon that portion of his pay roll which exceeds his 1940 pay roll by more than 150 per cent; that with respect to that portion of his pay roll which exceeds his 1940 pay roll by 100 per cent and not more than 150 per cent, he should be subject to the 2 per cent war risk rate, and not the higher rate of 2.7 per cent.

Appellants' notion of a fair distribution of the pay roll contributions is that an employer who paid wages during the next preceding calendar year of 150 per cent or more in excess of the wages paid by such employer in the calendar year 1940 should pay on the first $100,000 of his pay roll at the basic experience variable rate fixed by the Directors;

that as to the amount of such pay roll which exceeded the 1940 pay roll from 100 per cent to 150 per cent, he should be required to pay the war risk rate of 2 per cent and 2.7 per cent on the amount his pay roll was increased more than 150 per cent over his 1940 pay roll, and that the war risk amendments are invalid because they did not adopt such a plan.

The determination of the subjects and objects to which legislation shall apply, and the manner in which such legislation shall be applied, is primarily a question for the legislature. In *Stewart v. Brady*, 300 Ill. 425, we said: "Its classification of the objects of legislation is not required to be scientific, logical or consistent if it is reasonably adapted to secure the purpose for which it is intended and is not purely arbitrary. Legislative classification does not have to be so broad and comprehensive as to include all the evils which might by possibility be brought within its terms. Classification must be accommodated to the problems of legislation and must be palpably arbitrary to authorize a judicial review of it. It cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. It is competent for a legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having resemblance, though such power cannot be arbitrarily exercised and the distinction must have a reasonable basis. (*International Harvester Co. v. Missouri*, 234 U. S. 199.) In that case attention is called to the distinction between legislative power and the wisdom of its exercise in these words: 'It is to be remembered that the question presented is of the power of the legislature, not the policy of the exercise of power. To be able to find fault, therefore, with such policy is not to establish the invalidity of the law based upon it.' "

Applying what is there said to the classification of employers by the War Risk Amendments, we do not think appellants have discharged the burden of showing that such classification does not rest upon a reasonable basis. From a consideration of the legislative history of the War

Risk Amendments, the study made by the Board of Unemployment Compensation and Free Employment Office Advisors, under the direction of the Sixty-second General Assembly to make such study and report to the next session (Ill. Rev. Stat. 1941, chap. 48, par. 234(d),) we are not convinced that the classification made was not necessary and appropriate to the accomplishment of the purposes of the legislation and the elimination of the evils sought to be remedied. It must be assumed that the legislature, in making the classifications, acted upon its experience, and as a result of its investigation and study of the conditions which the legislation was intended to remedy. A classification so made will not be disturbed by the courts unless it clearly appears that there is no fair reason or basis for the classification.

The relation of those employers whose pay rolls expanded more than 100 per cent over their pay rolls in the normal year of 1940 to the purposes of the amendments and the potential evils sought to be avoided is so different from those employers whose pay rolls have not expanded to that extent as to justify the first classification made by the amendments. Likewise the relation of those employers whose pay rolls have expanded more than 150 per cent over the normal basic year is so different from those employers whose pay roll expansions are between 100 per cent and 150 per cent over the normal basic year as to constitute a sufficient basis for the second classification made by the amendments. Obviously, the greater the wartime expansion of the pay rolls, the greater the potential liability for the payment of unemployment compensation during the post-war period when there will be the greatest drain on the unemployment compensation fund. There is, therefore, a direct relation between war-expanded pay rolls and the potential liability which will be incurred as a result of wartime increase in employment. This constitutes an ample basis for the classifications made.

The final contention of appellants is that the determinations by the Director of the contribution rates for each appellant for the calendar year 1944 were not lawfully made under the Unemployment Compensation Act. Appellants are not in a position to raise this objection. This proceed-

ing, as already noted, was a claim for refund under section 25(d) of the act.

Section 18(c)(7)(C) provides: "The Director shall promptly notify each employer of his rate of contributions for each calendar year as determined pursuant to this Section, by mailing notice thereof to his last known address. Such rate determination shall be final and conclusive upon the employer for all purposes and in all proceedings whatsoever, unless within 15 days after mailing of notice thereof, the employer files with the Director an application for review of such rate determination setting forth his reasons in support thereof."

Section 25(a)(2) provides: "The Circuit Court of the county wherein the hearing was held shall by writ of certiorari to the Director have power to review all questions of law and fact presented by the record. Such suit by writ of certiorari shall be commenced within 20 days of the service of notice of the decision of the Director upon the employing unit affected thereby."

The record does not show that either of the appellants pursued the remedy provided by section 18(c)(7)(C), or by section 25(a)(2). The determination, therefore, of the Director, as to the variable rates of appellants for the year 1944, was final and is not subject to review, either in the certiorari proceeding or in the mandamus cases involved on this appeal.

Counsel on both sides are to be commended upon the energy and clarity with which they have presented this most difficult case. It has been ably presented on both sides. The briefs have been a great aid to the court. From a careful consideration of all the authorities cited and of all the arguments made, we are of the opinion that the trial court did not err in quashing the writ in the certiorari case and dismissing the petitions for mandamus.

The orders of the circuit court of Cook county are affirmed.

Orders affirmed.

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drain on the unemployment compensation fund. There is, therefore, a direct relation between war-expanded pay rolls and the potential liability which will be incurred as a result of war-time increase in employment. This constitutes an ample basis for the classifications made.

The final contention of appellants is that the determinations by the Director of the contribution rates for each appellant for the calendar year 1944 were not lawfully made under the Unemployment Compensation Act. Appellants are not in a position to raise this objection, *in view of our holding that the War Risk Amendments are valid.* This proceeding, as already noted, was a claim for refund under section 25(d) of the act.

Section 18(c)(7)(C) provides: "The Director shall promptly notify each employer of his rate of contributions for each calendar year as determined pursuant to this Section, by mailing notice thereof to his last known address. Such rate determination shall be final and conclusive upon the employer for all purposes and in all proceedings whatsoever, unless within 15 days after mailing of notice thereof, the employer files with the Director an application for review of such rate determination, setting forth his reasons in support thereof."

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The record does not show that either of the appellants pursued the remedy provided by section 18(c)(7)(C), or by section 25(a)(2). *Since we have upheld the validity of the War Risk Amendments, it follows that they are a part of section 18 and that determinations pursuant to them are pursuant to section 18.* The determination, therefore, of the Director, as to the variable rates of appellants for the year 1944, was final and is not subject to review, either in the certiorari proceeding or in the mandamus cases involved on this appeal.

Counsel on both sides are to be commended upon the energy and clarity with which they have presented this most difficult case. It has been ably presented on both sides. The briefs have been a great aid to the court. From a careful consideration of all the authorties cited and of all the arguments made, we are of the opinion that the trial court did not err in quashing the writ in the certiorari case and dismissing the petitions for mandamus.

The orders of the circuit court of Cook county are affirmed.

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